

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Order to Forfeit a Fine
for Edu-Care St. Joseph School

**FINDINGS OF FACT
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM**

A hearing in this matter was held on December 16, 2002, in St. Cloud.

Appearing on behalf of the Department of Human Services was Michael E. Burns, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127.

Appearing on behalf of Edu-Care St. Joseph School was Mary Arnold, Director, Edu-Care St. Joseph School, 108 Sixth Avenue North, Waite Park, MN 56387.

The record in this matter closed at the end of the hearing on December 16, 2002.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Jerry Kerber, Director, Division of Licensing at 444 Lafayette Road North, St. Paul, Minnesota 55155 to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

The issue in this case is whether or not the Order to Forfeit a Fine against Edu-Care St. Joseph School should be affirmed because the school failed to obtain a new background study for an employee who returned to work following a nine-month break.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Edu-Care St. Joseph School ("School" or "St. Joseph") is a licensed child care facility owned by the parish of St. Joseph's Church in Waite Park. It serves approximately 30 to 40 children, up to age six, on a Monday through Friday, 6:00 a.m. to 6:00 p.m. basis. It has been in operation for approximately ten years.

2. Tara Leigh Lindberg began working for the school in May of 2001.^[1] A background study was requested, and performed, and a background study clearance was issued on June 18, 2001.^[2]

3. Lindberg worked at the School, as a permanent, part-time employee during the summer. Her last day of work was August 24, 2001. The reason she stopped working for the School was that she got a full-time job at I.S.D. 466 in Cokato, Minnesota.

4. At the time that Lindberg gave the School a two-week notice, she asked about future employment as a substitute, and Lindberg and Mary Arnold (the School's Director) agreed that if there was a need at the School when Lindberg had time off from I.S.D. 466, then Lindberg would be able to fill in a substitute.

5. During the fall and winter of 2001, when Lindberg had time off from her I.S.D. post, she visited the school occasionally, and she also called the School periodically, asking if she was needed as a substitute. But throughout the school year (the traditional fall-winter-spring months), there was never a time that the School needed a substitute when Lindberg was available. The School did have occasional needs for substitutes during that time, but Lindberg's full-time employment did not allow her to fill the need.

6. As the summer months of 2002 approached, the School realized that its regular employees were requesting vacation time to a degree that it would need substitutes. The School contacted Lindberg, and she agreed to serve as a substitute. She began working on June 14, 2002 and worked through August 30. She then accepted a position with Head Start of St. Cloud, and stopped working at the School.

7. On July 24, 2002, Licenser George Redl conducted a routine inspection at the school. Approximately three months earlier, the School had supplied the

Department with a list of all current personnel. Lindberg's name was not on that list. As part of his inspection, Redl asked Arnold whether there were any new employees since the list had been submitted, and Arnold indicated that there were, and identified Lindberg as one of them. Arnold asked to see Lindberg's background study, and was shown the June, 2001 study.^[3] Redl had doubts about whether this study was still valid because he understood that Lindberg had quit at the end of the summer of 2001, and then had been rehired at the beginning of the summer of 2002. To Redl, this would mean that she ought to have a new study. Arnold, on the other hand, did not understand that a new study would be needed because she thought Lindberg's status as a possible substitute meant that the old study was still valid.

8. On August 23, 2002, the Department issued an Order to Forfeit a Fine and Correction Order resulting from the School's failure to have a new background study done on Lindberg when she began working again in June of 2002.^[4] On August 29, 2002, the School requested reconsideration or a contested case hearing.^[5] On October 9, 2002, a Notice of and Order for Hearing was issued, setting this matter on for hearing on December 16, 2002.

9. At some unspecified time in August of 2002, the Department issued an information sheet entitled "Information for License Holders, DHS Background Study Requirements".^[6] The document indicates that because the Department was continuing to see numerous violation of the background study requirements, and had imposed approximately \$20,000 in fines over the past six months, the Department was issuing the document in order to clarify its position as to when studies were needed for intermittent employees, substitute staff, re-hired employees and volunteers.

10. The School, in its personnel practices, distinguishes between (a) a "terminated" employee, who totally severs the employment relationship, and (b) an "inactive" employee, who does not work any hours but still remains on the payroll. When Lindberg left the school to work for the I.S.D. in August of 2001, the parish's business administrator treated Lindberg as an "inactive", pursuant to instructions from Mary Arnold. The business administrator discontinued Lindberg's life insurance and accidental death and disability insurance because she was no longer an active employee. But the business administrator did not provide Lindberg with COBRA materials, a step she normally would have taken if Lindberg had been terminated or otherwise permanently severed her relationship with the school. It is the parish's policy that if an inactive employee does no work for a 12-month period, then the employee is deemed to have terminated, and their file is closed.^[7]

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter under Minn. Stat. §§ 14.50 and 245A.08.

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

3. The Department has complied with all substantive and procedural requirements of law and rule.

4. Minn. Stat. § 245A.04, subd. 3(c)(3) requires background studies of “current employees or contractors of the applicant who will have direct contact with persons served by the facility, agency or program”. Paragraph (g) of that subdivision provides that the Commissioner is not required to conduct a study of an individual at the time of reapplication for a license if a study of the individual was conducted when the individual became affiliated with the license holder, and the individual has been “continuously affiliated” with the license holder since the last study was conducted and procedures are in place to disclose any criminal convictions for crimes that would constitute a disqualification.

5. There is no definition of “continuously affiliated” in statute or rule.

6. Although the Department has adopted detailed rules relating to background studies,^[8] they do not assist in identifying employees who have been “continuously affiliated”.

7. At the hearing, the Assistant Attorney General representing the Department was unable to provide any citations to case law or other authority which would assist in determining whether Lindberg was “continuously affiliated” with the School since the time of her background study. A brief search by the Administrative Law Judge did not reveal any case law or other controlling authority.

8. Based on the reasoning set forth in the Memorandum which is attached hereto and incorporated herein, Tara Lindberg was not “continuously affiliated” with the School from August of 2001 to June of 2002. Therefore, the school did violate Minn. Stat. § 245A.04, subd. 3 by not requesting a new background study in June 2002. However, there was no way for the school to be aware of the Department’s position in such cases because the Department did not issue its information sheet until August of 2002.

Based on the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

That the \$200 fine assessed against Edu-Care St. Joseph School not be forfeited, and any monies previously paid for such fine be returned to the School.

Dated this 15th day of January, 2003.

S/ Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Reported: Taped recorded no transcript prepared

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the Department of Health is required to serve the final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The Administrative Law Judge has concluded that Tara Lindberg was not “continuously affiliated”. This conclusion was reached because, when considering the goals of the background study program, an individual who does not work at a facility for a period of nine months could well have gotten into trouble during that period, and it makes sense to require a new background study. But the Administrative Law Judge is troubled by the fact that there was regular telephone communication between Ms. Lindberg and the School during her nine-month absence and Ms. Lindberg even dropped by the School to see the children from time to time. Those contacts lessen the likelihood that she spent 30 or 60 days in the county jail for some disqualifying offense. On the other hand, not every phone call or visit was documented, and there well could have been gaps between them large enough to allow such an event to have occurred without the School’s knowledge. On balance, a gap of nine months deserves a new background study.

The Administrative Law Judge has recommended that the fine not be forfeited in this case because the Department had failed to inform licensees of its position on what was meant by “continuously affiliated”. Neither the Assistant Attorney General nor the Administrative Law Judge were able to find any case law, statute, rule or other controlling precedent. Therefore, it is not reasonable to expect the School to know where the line is drawn.

The Department has acknowledged that there was an information problem when it took the time and effort to issue the August, 2002 information sheet. That sheet draws the line between “substitute staff” and “intermittent employment” as follows:

Substitute Staff: If an individual is continuously affiliated with a licensed program as a substitute staff person who is available to work in the capacity of a substitute on an on-call basis, background study forms are not required to be submitted each time the substitute staff person provides direct contact services as long as a background study form was submitted to DHS when the individual initially became affiliated with a licensed program.

Intermittent Employment: If a staff person is employed on an intermittent basis, such as a college student who works at a licensed program during summer months only, a background study form must be submitted each summer before the individual provides direct contact services. If the staff person returns at other times during the school year, for example winter break or spring break, a background study form must be submitted each time the individual returns to the program before s/he provides direct contact services.

Drawing the line where the Department did in its information sheet makes sense, and is consistent with the purpose of the statute. But the Department's choice is not the only possible choice. It is only one of several that would all be reasonable. While, technically, the school was in violation, it seems unfair to fine it for a violation that occurred before the Department announced its position.

A.W.K.

^[1] Exhibit 4.

^[2] Exhibit 3.

^[3] Exhibit 3.

^[4] Exhibit 1.

^[5] Exhibit 6.

^[6] Exhibit 2.

^[7] Testimony of Agathy Linch, the parish business administrator.

^[8] Minn. Rule Part 9543.3000, et sec.